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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets	))	WT Docket No. 99-217
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services	)))))	RECEIVED DEC 13 1999 FEDERAL COMMUNICATIONS COMMISSION OFFICE OF THE SECRETARY
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	))))	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	))	CC Docket No. 96-98

REPLY COMMENTS OF CONCERNED COMMUNITIES AND ORGANIZATIONS

CA: City of Benicia, City of Cerritos

CO: City and County of Denver, City of Lakewood, and Greater Metro Telecommunications Consortium

FL: City of Alachua, City of Coconut Creek, City of Tallahassee

IL: City of Marshall, Village of Lisle and the Illinois Chapter of NATOA consisting of the City of Chicago, Cook County, and approximately 50 other Illinois municipalities

IN: City of Carmel

MI: City of Detroit, PROTEC (Michigan Coalition to Protect Rights of Way) and 22 other municipalities

OR League of Oregon Cities, Metropolitan Area Communications Commission:

TX: City of Fort Worth and 16 other municipalities

WA: City of Bellingham, City of Medina

Kenneth S. Fellman
Kissinger & Fellman, P.C.
Ptarmigan Place, Suite 900
3773 Cherry Creek North Drive
Denver, CO 80209
Attorney for Greater Metropolitan Telecommunications Consortium

John W. Pestle
Patrick A. Miles Jr.
VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
333 Bridge Street, N.W.
Grand Rapids, MI 49504
Attorneys for Concerned Communities and Organizations

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SUMMARY

Concerned Communities and Organizations file these Comments on behalf of hundreds of municipalities with a population of over 18 million people in nine states.

On taxation matters regarding telecommunications companies the industry's comments show no factual basis for action; at most, they complain that taxes are too complicated and too high. Their complaints of filing multiple tax forms is due to their voluntary election to provide service in multiple areas and are no different than any other business operating in several states or several municipalities.

As a legal matter both the Commission and industry commenters have effectively conceded that the Commission has no authority to preempt state and local taxes. The Commission should therefore take no action on state and local taxes regarding telecommunications matters.

On franchising and right of way matters, Congress has removed Commission jurisdiction over telecommunications right of way management and compensation. Industry commenters make a myriad of requests as if the Communications Act of 1934 was worded to the effect that "the rights of way management and compensation practices of states and local units of government shall be as from time to time prescribed by the Commission." This is not the case.

In fact, Congress has specifically deprived this Commission of substantive jurisdiction on right of way and compensation matters. Specifically, Section 253 of the Act applies only if there is a "prohibition" on an entity providing telecommunications services. The impediments to entry set forth by the industry commenters do not rise to the level of a prohibition triggering Section 253. And even if there is a "prohibition" Congress expressly removed from Commission jurisdiction all right of way management and compensation practices: In addition to providing a safe harbor for municipalities on such practices Congress clearly specified that disputes on these items go to court, not to the Commission.

The preceding interpretation of Section 253 is reinforced by recent Second and Third Circuit Court of Appeals cases interpreting similar language in Section 332 (c)(7) of the Communications Act regarding municipal actions not "prohibiting or having the effect of prohibiting" the provision of wireless services. Specifically, these Courts of Appeal have ruled that there must be a "gap" or prohibition on service before there is a violation of Section 332 (c). These court cases thus indicate there must, in fact, be a "prohibition" under Section 253 before there is jurisdiction in any entity. Mere impediments or barriers will not suffice.

Industry commenters argument that telecommunications companies who use cable company lines cannot be required to obtain a separate franchise, permission or agreement is incorrect. The language and history of Section 621 and other sections of the Communications Act indicate that Congress did not intend that a cable operator can build or operate a telecommunications system without a telecommunications franchise or a cable franchise.

Cable companies thus cannot offer telecommunications services under their cable franchises.

Industry commenters have failed to show any significant problem on local right of way management and compensation matters. At most, industry commenters have shown sixty to seventy examples of problems. This is insignificant when contrasted with the fact that there are 37,000 local units of government in the United States.

Contrary to industry suggestions, the current situation regarding right of way management is one of increasing congestion; an increasing number of providers wishing to use the right of way; and a significant decline in the financial strength and capabilities of providers. This is in contrast to the past when there was a monopoly telecommunications provider of substantial financial strength and good construction practices.

Municipalities must change their requirements to address this new situation. In particular they must address the likelihood that some of the telecommunications providers in the rights of way will go bankrupt. They must provide for adequate insurance, indemnity bond and other financial assurances against the likelihood of bankruptcy. Such bankruptcies are likely, as shown by the Commission's experience in it's wireless spectrum auctions and the comparable experience with multiple telecommunications providers in the late nineteenth century.

For the preceding reasons the Commission should take no action regarding it's Notice of Inquiry relating to right of way compensation and management matters.

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REPLY COMMENTS OF
CONCERNED COMMUNITIES AND ORGANIZATIONS

I. INTRODUCTION

A. Concerned Communities and Organizations:

Concerned Communities and Organizations ("CCO")[1], by their attorneys, hereby file reply

[1]The Concerned Communities and Organizations consist of the following local governments and organizations:

California: City of Benicia, City of Cerritos

Colorado: City and County of Denver, City of Lakewood, and Greater Metro Telecommunications Consortium consisting of Adams County, City of Arvada, City of Aurora, City of Brighton, City of Castle Rock, City of Cherry Hills Village, City of Commerce City, Douglas County, City of comments in the above-captioned proceeding pursuant to the amended schedule set forth by the Commission. As is set forth in the preceding footnote, CCO represents hundreds of municipalities with a population of over 18 million people located in nine (9) states.

II. TAXATION

A. Introduction:

In the Notice of Inquiry the Commission inquired regarding "excessive or unequal burdens on competitive service providers [which] have the potential to inhibit the deployment of competitive facilities-based networks in local telecommunications markets." Notice of Inquiry at 81.

	Englewood, City of Edgewater, City of Glendale, City of Golden, City of Greenwood Village, City of Lafayette, City of Lakewood, City of Littleton, City of Northglenn, City of Parker, City of Sheridan, Town of Superior, City of Thornton, City of Westminster, City of Wheat Ridge
Florida:	City of Alachua, City of Coconut Creek, City of Tallahassee
Illinois:	City of Marshall, Village of Lisle and the Illinois Chapter of NATOA consisting of the City of Chicago, Cook County, and approximately 50 other Illinois municipalities (See full list attached as Exhibit A)
Indiana:	City of Carmel
Michigan:	City of Detroit, Ada Township, Alpine Township, Bloomfield Township, City of Ann Arbor, City of Belding, City of Coopersville, City of Gladwin, City of Ishpeming, City of Kentwood, City of Livonia, City of Marquette, City of Monroe, City of Tecumseh, City of Walker, City of Wyoming, Grand Rapids Charter Township, Holland Charter Township, Laketown Township, Robinson Township, Sparta Township, Tallmadge Charter Township, Vienna Township and PROTEC (Michigan Coalition to Protect Rights of Way) representing the units of government throughout Michigan on rights of way matters
Oregon:	League of Oregon Cities (representing all Oregon cities), Metropolitan Area Communications Commission
Texas:	City of Addison, City of Amarillo, City of Arlington, City of Bedford, City of Denton, City of Duncanville, City of Fort Worth, City of Grand Prairie, City of Irving, City of Laredo, City of Littlefield, City of Longview, City of Mansfield, City of Plano, City of Rockwall, City of Saginaw, City of Schertz, Town of Addison, Town of Flower Mound
Washington:	City of Bellingham, City of Medina

The Comments in response in this proceeding show that there is no legal or factual basis for Commission action to preempt or affect state or local taxation of the telecommunications industry.

B. No Factual Basis for Action:

The complaints of the industry commenters on Federal, state and local taxation can be simply summarized; they think the taxes are too complicated and that they are too high. However, virtually every other taxpayer in the United States has the same complaint. As a matter of policy such complaints thus form no principled basis for action by this Commission.

The Personal Communications Industry Association notes in it's filing, "the total Federal, state and local tax burden on intrastate wireless revenues exceeds twenty percent (20%) in some jurisdictions."[2] Other industry commenters make the same point.

However, it would be grossly unfair for this Commission (if it had the authority, which it does not) to address a problem with the Federal tax burden by unilaterally invalidating state and local taxes.

The claims of some of the commenters are astounding. AT&T is a good example. It effectively claims that the telecommunications taxation laws of essentially all fifty states are improper and should be replaced. See Comments of AT&T Corp. at 30 and following. To the contrary, AT&T's arguments demonstrate the opposite--the fifty states are justified in their approaches to telecommunications taxation. It is AT&T who is off base in claiming that all fifty states are incorrect.

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[2]Further Comments of Personal Communications Industry Association at 5.

Comparisons made by industry commenters are often similarly "offbase." For example, AT&T complains that in Illinois it is subject to tax in 803 local jurisdictions while "main street businesses only have to deal with one [local] taxing jurisdiction." Comments of AT&T Corp. at 33. AT&T conveniently omits to state that if a "main street business" operates in all 803 municipalities, it would pay 803 taxes just the way AT&T does.

The preceding example illustrates a fundamental point: There are fifty states and thousands units of local government in the United States. In today's deregulated environment telecommunications providers choose the states and localities in which they provide service. The providers know in advance the taxation schemes of these various units of government. They cannot legitimately complain after the fact about having to comply with the tax rules of the several states and local units of government in which they have voluntarily elected to conduct business. In this regard they are no different from General Motors, Ford, Sears or Wal-Mart which voluntarily subject themselves to state and local taxes in the several jurisdictions in which they choose to operate.

Concerned Communities and Organizations wish to reinforce the point made by several municipal commenters (and by the Commission in the Notice of Inquiry). That is that the taxes on telecommunications providers are an important part of overall governmental revenues and provide an important part of the funding of all government services. This is true at the Federal, state and local level.

Telecommunications taxes fund not only general government operations, they also fund specific important functions of government. For example specifically targeted taxes or fees such as

911 fees fund 911 service. In some states certain telecommunications taxes (property taxes) are specifically earmarked to funding public schools. In fact, in many states school taxes are the largest portion of local property tax bills.

These points illustrate the fundamental point that revenues from telecommunications taxes fund essential operations of government. Telecommunications taxes cannot be tampered with without seriously harming those same functions of government. For this reason they should not be tampered with.

C. No Authority to Preempt:

In the Notice of Inquiry the Commission recognized that it's authority to act on taxation matters is extremely limited, if existent at all.

Concerned Communities and Organizations are pleased that industry commenters effectively concede that this Commission has no authority to preempt state and local taxes.

The Commission's recognition that it has essentially no authority to preempt state and local taxes appears in the Notice of Inquiry at paragraph 84. Illustrations that the industry providers agree with this are shown (for example) by the Comments by AT&T which admit that the Commission has "limited authority" to address tax issues. It and other providers reinforce the lack of Commission authority by their recommendations. For example, on taxes AT&T only asks that the Commission "develop model taxation principles" to guide states and localities, "act as an advocate for simple and sound telecommunications taxation policies" and recognizes that all such actions are "non binding." Comments of AT&T at 44-45.

Particularly given the pages of detailed complaints on state and local taxation set forth by AT&T in prior portions of it's comments, this is an additional admission that the Commission lacks the legal authority to preempt state and local taxation.

D. **Conclusion:**

The industry commenters have failed to show any problem with Federal, state and local taxation worthy of action. And they have admitted that the Commission lacks authority to act. This portion of the Notice of Inquiry thus should proceed no further.

III. FRANCHISING AND RIGHTS OF WAY

A. **Lack of Commission Jurisdiction on Right of Way Compensation and Management Matters:**

Congress has removed any Commission jurisdiction over telecommunications right of way management and compensation matters. The Comments by the various cable and telecommunications providers are simply in error on this fundamental point. See, for example, the Comments of AT&T Corporation at pages 17-20 which ask the Commission to set forth a "national policy regarding the scope of municipal local rights-of-way management activity" and state AT&T's recommendation for what that policy should be.

AT&T and other industry commenters act as if the Communications Act of 1934 was worded in relevant part to read that "the rights of way and compensation practices of states and local units of government shall be as from time to time prescribed by the Commission." This is not the case. In fact, Congress has done the opposite by depriving the Commission of substantive jurisdiction on right of way management and compensation matters.

Specifically, as is set forth in more detail below, Section 253 applies only if as an initial matter there is a state or local legal requirement that "may prohibit or have the effect of prohibiting" an entity from providing telecommunications services. 47 USC Section 253(a). Only if there is such a "prohibition" on entry does Section 253 apply.

Mere impediments or barriers to entry which do not rise to the level of a "prohibition" do not trigger Section 253.

If this first requirement is met, the FCC has certain preemption jurisdiction under Section 253 (d). But Congress expressly created a safe harbor and removed from such Commission jurisdiction all right of way management and compensation practices set forth in Section 253 (c). As is set forth below, Congress clearly specified that disputes on such matters should go to the local Federal District Court not to the Commission.

Thus, contrary to the claims of the various providers in their comments in this proceeding, this Commission has been stripped by Congress of authority to deal with right of way management or compensation matters. The providers litany of complaints and recommendations that the Commission assert jurisdiction and adopt substantive right of way and compensation rules are addressed to the wrong forum--they can only be addressed to Congress or the courts.

B. Section 253 Prohibits Commission Jurisdiction:

Section 253(a) of the Communications Act states that state or local regulation that may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service is preempted. Section 253(d), however, only allows the Commission to preempt the enforcement of regulations found to violate or be inconsistent with

Sections 253(a) or (b) and then only to the extent necessary to correct the violation or inconsistency. Right-of-way management and compensation matters described in Section 253(c) are excluded from the preemption authority in Section 253(d).

In this regard, the legislative history of Section 253(d) confirms that Congress did not grant this Commission jurisdiction to address related to right-of-way management and compensation requirements. As presented to the Senate in June, 1995, Section 253 (then referred to as Section 254) contained a preemption clause which provided:

> (d) PREEMPTION. -- If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

On June 12, 1995, Senator Feinstein proposed an amendment to the Senate bill which would eliminate the preemption clause in its entirety. In support of the amendment, Senator Feinstein stated:

> "On one hand, the bill before the Senate gives cities and States the right to levy fair and reasonable fees and to control their rights of way; with the other hand, this bill, as it presently stands, takes these protections away.
>
> "The way in which it does so is found in section 201, which creates a new section 254(d) of the Cable Act, and provides sweeping preemption authority. The preemption gives any communications company the right, if they disagree with a law or regulation put forward by a State, county, or a city, to appeal that to the FCC.
>
> "That means that cities will have to send delegations of city attorneys to Washington to go before a panel of telecommunications specialist

> (sic) at the FCC, on what may be very broad questions of State or local government rights.
>
> *   *   *
>
> "[P]reemption would severely undermine local governments' ability to apply locally tailored requirements on a uniform basis.
>
> *   *   *
>
> "The exemption means that every time a cable operator does not like it, the Washington staff of the cable operator is going to file a complaint with the FCC and the city has to send a delegation back to fight that complaint. It should not be this way. Cities should have control over their streets. Counties should have control over their highways.
>
> "The right-of-way is the most valuable real estate the public owns. State, city, and county investments in right-of-way infrastructure was $86 billion in 1993 alone. Of the $86 billion, more than $22 billion represents the cost of maintaining these existing roadways. These State and local governments are entitled to be able to protect the public's investment in infrastructure. Exempting communication providers from paying the full costs they impose on State and local governments for the use of public right-of-way creates a subsidy to be paid for by taxpayers and other businesses that have no exemptions.
>
> *   *   *
>
> "By contrast, if no preemption exists, the cable company may challenge the city or State action directly to the Federal court in the locality and the court will review whether the city or State acted reasonably under the circumstances." 141 Cong. Rec. S8170-S8171 (June 12, 1995) (statement of Sen. Feinstein).

The purpose of Senator Feinstein's amendment, therefore, was to completely deny this Commission jurisdiction to hear any claims regarding local regulations.

On June 13, 1995, Senator Gorton offered an amendment to the Feinstein amendment which would limit the scope of the FCC's preemption jurisdiction so that the FCC would have no jurisdiction over disputes regarding regulation of public rights-of-way and compensation due for the use of public rights-of-way. In support of his amendment, Senator Gorton stated:

> "Now, the Senator from California I think very properly tells us what the impact of [preemption] will be. It does not impact the substance of the first three subsections of this section at all, but it does shift the forum in which a question about those three subsections is decided. Instead of being the Federal Communications Commission with an appeal to a Federal court here in the District of Columbia, those controversies will be decided by the various district courts of the United States from one part of this country across to every other single one.
>
> *   *   *
>
> "So in order to try to balance the general authority of a single Federal Communications Commission against the specific authority of local communities, I have offered a second-degree amendment to the Feinstein-Kempthorne amendment.
>
> *   *   *
>
> "So this amendment does two things, both significant. The first is that it narrows the preemption by striking the phrase "is inconsistent with " so that it now allows for a preemption only for a requirement that violates the section. And second, it changes it by limiting the preemption section to the first two subsections of new section 254; that is, the general statement and the State control over utilities.
>
> "There is no preemption, even if my second-degree amendment is adopted, Mr. President, for subsection (c) which is entitled, "Local Government Authority," and which is the subsection which preserves to local governments control over their public rights of way. It accepts the proposition from those two Senators that these local powers should be retained locally, that any challenge to them take place in the federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions."

141 Cong. Rec. S8212-S8213 (June 13, 1995) (statement of Sen. Gorton).

The Gorton amendment was adopted, resulting in the Section 253(d) preemption language that is in dispute in this proceeding.

This legislative history irrefutably establishes that Congress intended to and did deprive this Commission of any jurisdiction to hear the right of way management or compensation matters. Local regulations which relate to the control of public rights-of-way or compensation for the use of public rights-of-way are simply not subject to Commission review. Challenges to these local regulations must be brought in local courts, not before the Commission.

C. **Definition of Prohibition**:

Recent decisions from the Second and Third Federal Courts of Appeal (mainly decided since Comments were submitted in this case on October 12) indicate that the "prohibition of service" prerequisite for a cause of action under amendments made by the Telecommunications Act of 1996 is to be interpreted literally, and not circumvented as industry commenters in this proceeding would suggest.

In the 1996 Act Congress concurrently added two sections addressing local authority regarding telecommunications providers. Section 253 prohibits certain state and local legal requirements that "may prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications services. Section 704 of the 1996 Act added Section 332 (c) (7) to the Communications Act preserving local zoning authority over wireless facilities, with the exception that local regulation "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 USC Section 332 (c)(7)(B)(i)(II).

Congress used the same wording in the two Sections addressing local authority, namely, municipalities shall not "prohibit or have the effect of prohibiting" certain services. As the Commission is aware, Congress is presumed to have the same intent when it uses the same phrase in two different portions of a statute. This is particularly true here where the two Sections were adopted by Congress on the same day addressing much the same subject matter.

In it's two November 1999 decisions the Third Circuit ruled as follows:

- Municipalities have the effect of prohibiting service if their decisions lead to a "significant gaps" in the availability of wireless services. APT Pittsburgh v. Penn Township, __ F3rd__, 1999 U.S. App. Lexis 29,314 at 8-10 (3rd Cir, 1999) ("Penn Township"); Cellular Telephone Co. v Zoning Board of Adjustment of the Borough of Ho-Ho-Kus, __ F3d__, 1999 U.S. App. Lexis 30,093 at 5, 7, 10 (3rd Cir, 1999) ("Ho-Ho-Kus").
- There are significant gaps in wireless services if a user cannot connect with the national telephone network or cannot maintain a connection supporting reasonably uninterrupted communication. Ho-Ho-Kus at 4-5.
- However, the gap must not be just in the complaining provider's service–it must be an area unserved by any provider. "The provider's showing on this issue will thus have to include evidence that the area the new facility will serve is not already served by another provider." Penn Township at 7-8, 10.[3]

[3]The Third Circuit's apparent logic was that there was no effective denial of "wireless services" (plural in the statute) if some providers could serve the area in question. Alternatively, if some providers can serve the area with facilities that comply with local zoning and land use law and

- "The providers still bear the burden of proving that the proposed facility is the least intrusive means of filling those gaps with a reasonable level of service." Ho-Ho-Kus at 10 (emphasis supplied). Accord Penn Township at 10. The Court clearly differentiated barring wireless service from barring wireless facilities in a municipality (service might be provided by a tower located in an adjacent municipality) Ho-Ho-Kus at 5.

The Third Circuit cases built on a decision earlier in 1999 by the Second Circuit which also applied the "shall not prohibit or have the effect of prohibiting" provision of Section 332 (c) to reach a similar result. Specifically, in Sprint Spectrum v. Willoth, 176 F3d. 630 (2d Cir, 1999) ("Willoth") the Court squarely addressed the provider's claim that failure to allow the disputed tower in question would create a gap in cellular coverage and was therefore an illegal prohibition of service under Section 332 (c).

The Willoth Court held that a municipality "may reject an application for [a tower] in an under-served area without thereby prohibiting wireless services if... the service gap can be filled by less intrusive means" (such as less sensitive sites, shorter towers, camouflaged towers or the like) or if "the holes in coverage are very limited in number or in size." Willoth at 643. It also noted that the "gap" must not be served by any other wireless carrier.

The teaching of the Second Circuit and Third Circuit cases for this proceeding is that the Federal Courts of Appeals seriously and literally apply the "prohibit or have the effect of

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one cannot, it is that provider's defective system design and not municipal action that is effectively preventing service.

prohibiting" language. This language in the cellular tower zoning provision of the 1996 Act is identical to the language in Section 253 at issue in this proceeding. As is set forth above, Congress is deemed to mean the same thing when it uses identical language in different places in the same statute. The Second Circuit and Third Circuit wireless tower cases show that there is no jurisdiction for action under Section 253 (by the Commission or the courts) until there, in fact, has been a prohibition of service.

As is set forth in municipal comments in this proceeding and by the Commission's own studies referred to therein, the telecommunications industry in the United States is generally vibrant and growing rapidly. Although there may be occasional impediments on right of way management or compensation matters there are no "prohibitions on entry" so as to confer jurisdiction on a court (let alone this Commission) under Section 253.

D. Municipalities Can Require Cable Companies to Obtain a Separate Telecommunications Franchise:

Some industry commenters argue that telecommunications companies who use cable company lines cannot be required to obtain a separate franchise, permission or agreement. See, for example, Comments of MediaOne, NCTA and AT&T. This contention is incorrect.

The Telecommunications Act of 1996, Pub. L. No. 104-104,110 Stat. 56 ("1996 Act") protects the right of franchising authorities to manage their public rights-of-way and to require fair and reasonable compensation from telecommunication providers. The plain language and intent of the 1996 Act explicitly preserves local control over the rights-of-way and compensation for its use. In order to foster competition in telecommunication services, Congress only limited this reservation in three respects: (1) that the compensation be fair and reasonable; (2) that the local government's management and compensation be on a competitively neutral and nondiscriminatory basis; and (3) that a cable operator or its affiliate offering telecommunication services need not obtain a cable franchise under Title VI for the provision of telecommunication services. 47 U.S.C. § 541(b)(3)(A).

The third limitation is set forth in Section 621 of the Communications Act which provides that a cable operator or its affiliate engaged in the provision of telecommunication services need not "obtain a franchise under this title for the provision of telecommunication services." 47 U.S.C. § 541(b)(3)(A)(i) [emphasis added]. The "title" referred to is Title VI, which pertains to cable communications. Nothing in the Act, however, states or implies that such an entity need not obtain a franchise under other applicable titles, statutes or regulations. The Commission must reject the industry commenters attempt to have the Commission adopt a position in direct contravention of the 1996 Act's plain language. The interpretation they desire renders the phrase in Section 621 "under this title" meaningless. Congress clearly intended that a cable franchise is not necessary for the provision of telecommunication services by a cable operator or its affiliate. See 47 U.S.C. § 541(6)(3)(A). Congress did not intend that a cable operator can build or operate a telecommunications system without a telecommunications franchise or that the cable franchise sufficiently covers telecommunications services.

The legislative history of the 1996 Act amply supports this conclusion. In late December, 1995 the Congressional Conference Committee largely completed its work on preparing a Conference Committee Report reconciling the different House and Senate versions of the telecommunications legislation. The Conference Committee released its proposed report -- which referred to the Telecommunications Act of 1995. In this report, Section 303 -- which amends Section 621(b) -- did not contain the phrase "under this title" in the following subsection:

> "(B) A franchising authority may not impose any requirement that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof." Section 621(b)(3)(B), Telecommunications Act of 1995.

State and local governments objected to such broad language in the proposed Telecommunications Act because cable operators would claim it allowed them to offer telecommunications services without obtaining a telephone franchise. And such a provision was broader than necessary to obtain the stated intent of preempting (as discussed below) cable franchise provisions which prohibited the franchisee from providing telephone service. As a result, Congress modified the language of Section 303 before adoption of the 1996 Act to insert the phrase "under this title." Accordingly, Section 621(b)(3)(B) now states as follows:

> "(B) A franchising authority may not impose any requirement under this title that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof." 47 U.S.C. § 541(b)(3)(B) [emphasis added].

Congress intended the phrase "under this title" to separate cable franchising under Title VI from telecommunications franchising. It prevents franchising authorities from attempting to undercut the 1996 Act by purporting to use Title VI to prevent cable operators from providing telecommunications service. Section 621(b)(3)(B) is silent on the power of franchising authorities to regulate telecommunications outside of the confines of Title VI. It would eviscerate the meaning of this provision to adopt the industry's view that Section 621 (b)(3)(8) means that the municipalities cannot franchise cable company telecommunications services.

The following comments from a key Congressional leader are instructive:

> "Mr. Speaker, I want to say a few special words about the concerns of our local elected officials, and mostly especially our mayor's. This conference agreement strengthens the ability of the local governments to collect fees for the use of public rights-of-way . . . At the same time, state and local governments retain their existing authority to impose fees on telecommunication providers, including cable companies that offer telecommunication services. Finally, and perhaps most important, Section 303 does not preclude a local government from lawfully managing public rights-of-way with respect to a cable company's telecommunications services." 142 Cong. Rec. H1156 (February 1, 1996) (statement of Rep. Dingell).

Cable companies thus cannot offer telecommunications services under their cable franchises. The 1996 Act does not preempt non-discriminatory and competitively neutral right-of-way management (i.e., franchising) by state and local governments. Simply put, the 1996 Act allows municipalities to require cable companies to obtain separate permission before constructing a telecommunications system using the rights-of-way.

What Section 303 of the 1996 Act does preclude are new cable franchise provisions that would prevent a cable company from offering telecommunications service. This is a legitimate and understandable goal of Congress given the history of limitations on service in some cable franchises and the general goal of the 1996 Act to encourage competition between telephone and cable companies.

Historically, some cable franchises have contained provisions expressly intended to prevent cable companies from offering telecommunications service. Such provisions were present for several reasons. First, some states had statutes which provided that a municipality could not grant a telephone franchise until the proposed franchisee had obtained a certificate of public convenience and necessity from the state utilities commission.[4] Cable franchises therefore sometimes contained statements that the franchisee was not allowed to provide telephone service to avoid claims that the preceding statute was breached, thereby potentially jeopardizing the cable franchise.

Second, historically, telephony and cable have been substantially different. For example, customer service matters regarding cable are regulated by the municipalities awarding a cable franchise. Customer service matters pertaining to telephone typically were handled by state utility commissions. Cable rates were regulated locally, while telephone rates were regulated by state utility commissions and this Commission. Telephone systems required use of public rights of way in central business districts, commercial and industrial areas. Cable systems did not because they mainly served residential areas. Telephone service, to be effective, required interconnection between adjacent providers. Cable systems did not. For these types of reasons and more, some cable franchises as a matter of good policy and careful craftsmanship were careful to spell out that the franchisee could not provide telephone service.

Third, and most fundamentally, until recently the prevailing view on utilities generally (and telephone in particular) was that the best approach was to have a regulated monopoly: Having two

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[4]For example, the state of Michigan, until recently had a statutory provision which read, in pertinent part, as follows: "Any person, co-partnership or corporation desiring to obtain a franchise to construct a telephone system in any municipality in the state of Michigan, shall apply to the [Public Service] Commission for a certificate of public convenience and necessity, and the Commission may grant or withhold said certificate after a public hearing and investigation upon the merits of the application in the manner provided herein for holding of public hearings and investigations on complaint, <u>and no such person, co-partnership or corporation shall be granted a franchise in any municipality in the state of Michigan to construct a telephone system until they have received a certificate of public convenience and necessity herein provided for</u>." MCLA § 484.109 (repealed by P.A. 1991, No. 179, § 603, effective January 1, 1992) [emphasis added].

utilities compete (with two sets of wires and poles) was not only undesirable but harmful. Many states thus passed "antiduplication" statutes requiring a second provider (electric, telephone or gas) to obtain a "certificate of public convenience and necessity" from an entity such as a state utility commission before it could duplicate the facilities of another provider.[5] Cable franchises in some cases reflected (or complied with) the philosophy of such statutes by stating that the franchisee could not provide telephone service.

In light of this background, it is clear and understandable why Congress wished to prevent municipalities in new cable franchises from imposing conditions preventing a cable operator from providing telephone service. This is what Section 621(b)(3)(B) means when it precludes requirements "under this title" prohibiting the provision of telecommunications service.

The Commission has recognized the difference Congress established between Title VI franchise requirements and the authority of state or local governments to grant permission to use the public rights-of-way for non-cable purposes as a "franchise." See e.g. Implementation of Section 302 of The Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46, FCC 96-334 (August 8, 1996), at ¶ 194. In this regard, the Commission stated as follows:

> "First, we clarify that the preemption is limited to Title VI or Title VI (franchise-like) requirements, and does not extend to all types of potential franchises. If, for example, a state or local government characterizes permission to use the public rights-of-way as a 'franchise,' such franchises are not preempted so long as they are issued in a non-discriminatory and competitively neutral manner." Id.

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[5]See e.g. footnote 6, supra; see e.g. Michigan's certificate requirement for electric utilities, MCL 460.501, MSA 22.141, et. seq.

As one member of Congress stated, "As I understand it, localities will maintain their ability to control the public rights-of-way and to receive fair compensation for its use. Federal interference is unnecessary, as long as localities do not discriminate. I think that is fair." 142 Cong. Rec. H1150 (February 1, 1996) (statement of Rep. Slaughter).

E. Separate Uses of the Rights-Of-Way Require Separate Grants of Permission.

Congress intended the 1996 Act to permit local governments to manage their rights-of-way and receive compensation regardless of the type of telecommunication service being offered. Specifically, Section 253(c) does not preempt the ability of state or local governments to manage the public rights-of-way or to require fair and reasonable compensation on a competitively neutral and nondiscriminatory basis. This section was not intended to allow cable operators to offer telecommunication services without the benefit of a local franchise. This is plainly shown by the following statement appearing in the 1996 Act's legislative history:

> "[Section 253(c)] further recognizes that state and local governments may apply different management and compensation requirements to different telecommunication providers to the extent that they make different use of the public rights-of-way. Section 253(c) also makes clear that Section 253(a) is inapplicable to right-of-way management and compensation requirements so long as those entities that make similar demands on the public rights-of-way are treated in a competitively neutral and nondiscriminatory manner." 142 Cong. Rec. S716 (February 1, 1996) (statement of Sen. Feinstein); see also 142 Cong. Rec. H1174 (February 1, 1996) (statement of Rep. Pelosi).

Industry commenters wrongly ask this Commission to grant cable operators preferential status by effectively allowing the construction and operation of telecommunications systems under an existing cable franchise. Aside from the takings issues which arise, Congress did not intend to permit telecommunications services under cable franchises. As the statute and its legislative history show, Congress effectively separated the two services and preserved state and local governments' ability to franchise both.

Indeed, municipalities might be discriminating in favor of cable companies were they not to require a telecommunications franchise before the cable company builds a telecommunications network and offers telecommunications services. This is because without question, phone companies need a cable franchise under Title VI to offer cable services in the City.

A cable franchise often has inadequate coverage and protection of the rights-of-way for cable companies to offer telecommunication services. For obvious reasons cable operators, serve mainly residential subscribers. Commercial and industrial areas are not generally wired for cable service. Thus, if a cable company offers telecommunication services to commercial and industrial areas (which have been a main target of new phone companies), then the cable company obviously will need to install either aerial or underground fiber optic wires in areas which do not presently have a cable system.

This shows a key point: Telephone systems require substantially more municipal property than do cable systems. The fundamental reason for this is that telephone service is provided to every business, non-profit group and organization in a municipality, plus residential customers, whereas cable service is provided only to residential customers. Businesses, units of government, non-profit groups and other organizations all have telephone service. But they rarely have cable service. For this reason the central business districts of cities generally do not have cable service or cable lines. Similarly, commercial areas, business parks, industrial parks and shopping, commercial and industrial areas also lack cable service or cable lines. Yet such commercial and industrial areas have been the primary targets of new telephone companies due to the large phone bills (local, long distance or both) of businesses in such compact areas.

Thus, for a cable company to provide telephone service it must construct its lines in and use many more streets and public rights of way than it ever used just for cable service. The exact percentage increase will vary with the demographics and geography of particular communities. In communities with large central business districts, commercial areas and industrial areas -- such as many of Concerned Communities and Organizations-- the percentage increases substantially. For example, in a community which is roughly 50% residential and 50% commercial/industrial, the number of streets on which the cable (and would-be phone) company has to string its lines will roughly double. For heavily commercial and industrial municipalities (e.g., those which might be only 25% residential), the streets and public ways being used increase four-fold.

These dramatic increases in the miles of streets used by cable companies shows Congress did not intend, and the Commission certainly cannot allow, cable operators to build a telecommunications network without the express permission of the local authority and without adequate compensation therefor. It is for reasons such as these that Congress ultimately was careful not to draft the 1996 Act so as to confer the types of rights which the cable operators are claiming in their comments in this proceeding.

F. There is No Evidence of Significant Problems:

The complaints set forth by industry commenters in this proceeding show one overwhelming fact: Claimed problems with respect to local right of way management and compensation policies are few and far between.

At most, the industry commenters have set forth sixty to seventy examples of local units of government where there are right of way management problems.

This number is dwarfed by the fact that there are approximately 37,000 units of local government in these United States.

These simple statistics show that there is no problem worthy of Commission action.

The preceding figures are corroborated by the litigation described by the industry commenters relating to right of way matters. There appear to have been ten to twenty court cases nationwide relating to right of way compensation or management matters. The small number of cases speaks volumes given (as this Commission knows) that the telecommunications industry is not shy about going to court where it believes that it's rights are being infringed on.

As set forth in the Comments of the National Association of Counties, et. al. "Only if the telecommunications industry submits hard statistical evidence in this docket demonstrating that right of way or tax policies are barriers to entry can there be any possible basis for regulatory intervention by the Commission in the marketplace." Initial Comments of the National Association of Counties at 5.

The industry has failed utterly to meet this (or any other standard) for showing that there is a problem worthy of Commission attention.

G. <u>Right of Way Situation and Risks</u>:

The industry's comments would have this Commission believe that they are all responsible actors, that problems with right of way activity are few and far between and that as a result <u>all</u> telecommunications providers must be allowed to use the rights of way and that at most municipalities can regulate the timing and precise location of an excavation. The truth is different and far more complicated, difficult and troubling.

Briefly, the current situation is one where there is:

- Increasing congestion in the public rights-of-way,
- An increasing number or providers wishing to use the rights-of-way, and
- A decline in the financial strength and construction knowledge of such entities.

By contrast, in the past municipalities typically dealt with one telecommunications provider. This monopoly was large, of unquestioned financial strength, usually adhered to high construction practices and bankruptcy was not even remotely a consideration.

Conditions are now changing, and municipal requirements must change in response. New providers often lack the preceding attributes. They often have few assets.[6] Due to competition with its necessary correlation of business failure now being allowed (discussed below), there can be no assurance that the provider will not go bankrupt and abandon its facilities within the rights-of-way. There is a potential for large, unreimbursed damage claims against municipalities as the result of actions of new telecommunications providers (see below).

As a result, municipalities have adapted their ordinances, agreements and other right-of-way requirements to these new conditions. At minimum, they cannot assume that all providers will have the favorable attributes which the incumbent enjoyed in the past. Construction practices will need

[6] They have few assets because they are often start-up companies with few unencumbered assets. Alternatively, if they are a subsidiary of a company with substantial assets they are usually structured such that the entity with facilities in the rights-of-way is a separate corporation with few unencumbered assets.

to be more carefully monitored, inspection requirements may vary from provider to provider (see below), and insurance and bond requirements may vary with the financial strength of the provider. Bonds, letters of credit and insurance may be less important (or in the case of insurance, may have higher deductibles) for a provider with a large balance sheet or parental guaranty, compared to a provider with few unencumbered assets.

Similarly, as the rights-of-way become more congested, municipalities, of necessity, will have to enforce different and likely more rigorous requirements in order to ensure that it is safely available for all its uses -- vehicular traffic, pedestrian traffic as well as utilities.

Some industry commenters ask this Commission to limit or restrict provisions such as those that would (1) require providers to indemnify the municipality for any and all harms that they may cause, (2) require providers to reimburse municipalities for all costs the municipality incurs for the review, inspection or supervision of provider's activities and (3) provide insurance and a letter of credit. These provisions cannot be preempted, because to do so would be both unsound policy and an unlawful taking in violation of the Fifth Amendment to the U.S. Constitution.

1. Importance

Indemnity, insurance, bond/letter of credit and cost reimbursement provisions are important to municipalities. There is a significant risk of major damage claims from utility construction in public rights-of-way, particularly from underground construction. This relates to the potential for contact with electric, steam, sewer, water and gas mains with the resultant risks of major steam explosions, electric explosions, gas explosions, and sewer and water main breaks. Such incidents may have major effects on life, property, the environment and public health and safety.

In the event of significant claims, municipalities are often sued together with anyone else who might potentially be responsible. Of particular concern to municipalities is that they often become "target defendants" particularly if there is a proliferation of new telecommunications providers in the public ways with few assets and little, if any, insurance. As this Commission is aware, under the laws of many states if there are multiple tortfeasors one defendant often can be held liable for the entire amount of any judgment in favor of a plaintiff. Thus, local units of government face the prospect that they can end up paying the entire amount of any damage claim relating to activities of telecommunications providers in the public ways even if the municipality is only 1% responsible. This is particularly a risk where a telecommunications provider has few or no unencumbered assets. As a result, municipalities must take adequate protective measures. These protective measures include, among other things, placing adequate insurance, indemnity, cost reimbursement and bond/letter of credit provisions in the laws, ordinances and agreements governing telecommunications providers operations in the public rights-of-way.

This Commission has expressly acknowledged such types of measures are appropriate municipal action in the Classic Telephone[7] case, where it said that "examples of the types of restrictions that Congress intended to permit under Section 253(c) includ[ed] . . . requir[ing] a company to indemnify the City against any claims of injury resulting from the company's excavation" Classic Telephone, at ¶ 39 (citation omitted). Otherwise it is the municipality's general fund and its residents and taxpayers who have to pay for the harm caused by the misconduct of a telephone provider.

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[7] In re Classic Telephone, Inc., FCC 96-397 (October 1, 1996) ("Classic Telephone").

At the present time (and perhaps partly due to the 1996 Act) municipalities are seeing an increase in the number of telecommunications providers with few, if any, assets, and often with correspondingly little experience with construction in the public rights-of-way. These facts, combined with the situation where telecommunications providers increasingly operate in a competitive environment (not the monopoly rate of return regulated environment in the past) where providers can go bankrupt and abandon their facilities in an unsafe condition, create substantial concerns for municipalities nationwide.

A related concern is that often the costs of supervising a utility or contractor cannot be predicted in advance. The Commission should be aware that municipalities (like this Commission) often vary their inspection requirements to some degree based upon the experience and track record with that entity. For example, individual drops and connections to particular customers may be inspected for compliance with safety codes on only a sampling basis (one in ten, one in twenty) if a utility has a proven track record of excellent compliance with building and electrical code requirements. However, if a utility has developed a reputation for noncompliance, a municipality may greatly increase inspections to the point of inspecting every installation for compliance. Similarly, new providers may be subjected to greater inspection requirements at the outset than an incumbent (which has a good track record) until the track record for the newcomer can be ascertained.

2. Less Than Full Reimbursement a Taking

As described by municipal comments in this proceeding, this Commission has no statutory authority to "take" municipal property in violation of the Fifth Amendment to the U.S. Constitution.[8] And as the U.S. Supreme Court has set forth, any requirement that prevents the municipalities from being reimbursed the full costs imposed on them by a telecommunications provider is confiscatory and in violation of the Fifth Amendment to the U.S. Constitution. See e.g. FCC v Florida Power Corporation, 480 U.S. 245, 94 L.Ed.2d 282, 107 S.Ct. 1107, 1112-1113 (1987); St. Joseph Stockyards Company v United States, 298 U.S. 38, 53, 56 S.Ct. 720, 726 80 L.Ed. 1033 (1936); See Permian Basin Area Rate Cases, 390 U.S. 747 at 770, 88 S.Ct. 1134 at 1361, 20 L.Ed.2d 312 (1968). Thus, for example, this Commission's pole attachment fees survived Supreme Court challenge in Florida Power Corp. only because they covered the entire "additional costs of providing pole attachments."

To the extent this Commission invalidates cost reimbursement, indemnity, insurance, bond/letter of credit provisions, parental guarantee or similar financially related provisions it violates the "additional cost" standard of the preceding Supreme Court cases because municipalities are not being reimbursed for the "additional costs" imposed on them by telecommunications providers. Any such result is confiscatory and a violation of the Fifth Amendment.

[8] The Supreme Court has long ruled that any "permanent physical occupation of real property" is a taking under the Fifth Amendment, and has specifically applied this principle to cable and telephone systems. See Loretto v Teleprompter Manhattan CATV Corp., 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982) and cases cited therein.

H. Risk of Bankruptcy:

This proceeding, in large part, is focused on promoting competition in the telecommunication industry. Competition at it's extreme includes two major elements of which only one--entry by new competitors--has been stressed to date by industry commenters and this Commission.

An equally important element of competition is the failure or bankruptcy of companies which do not perform appropriately. Municipalities addressing the entry into the rights-of-way by a host of new telecommunications companies face the reality that some of these companies may shortly go bankrupt. Municipalities have to take appropriate steps to make sure that the municipality and the public are adequately protected when such bankruptcies occur.

As this Commission has learned in it's wireless spectrum auction proceedings[9] it is not a question of whether bankruptcies will occur, it is simply a question of how many, when and to whom.

Such bankruptcies are no surprise: They are an inevitable and desirable result of competition to weed out the inept, inefficient or unlucky provider. Bankruptcies of some telecommunications providers are likely given the rapid growth of the industry and the large number of competitors for a finite amount of telecommunications revenues.[10]

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[9]To date approximately ten successful bidders in the Commission wireless Spectrum auctions have declared bankruptcy. As the Commission is well aware this has created significant problems with the Commission in "reclaiming these licenses such that Spectrum can be re-auctioned to other participants.

[10]Telecommunications markets are unlikely to support all the following:
- The incumbent phone company.
- Competing phone companies.
- A cable company providing telecommunications service.

Such bankruptcies would repeat the pattern from an earlier era of telecommunications competition: In the late Nineteenth century the philosophy regarding utilities and the means to effectively regulate them was to award multiple franchises for telephone (or electric) service for a given city. The theory was that competition between providers would lead to adequate regulation and provide adequate protection for the public.

In fact, this approach confirmed the laws of natural monopoly as one entrant (typically the largest) squeezed out the others. Other providers went bankrupt or merged into the successful survivor.

States and local units of government were left with the problems created by the wires, trenches and facilities abandoned in the rights of way by bankrupt providers. Members of the public injured by the facilities of bankrupt providers were left uncompensated.

Concerned Communities and Organizations set forth the preceding to emphasize to this Commission how municipalities must take appropriate action to see that they, their residents and businesses are adequately protected when some providers go bankrupt. Some of the types of measures which municipalities may address include the following:

- Assuring that the provider meets a minimum level (appropriate to its situation and activities) of financial and managerial qualifications.
- Reviewing the provider's history of compliance or problems on right of way matters.

- Several (three to nine) cellular telephone companies.
- Satellite based telephone companies.
- Fixed wireless telecommunications companies.

Some of these entities are likely to fail.

- Obtaining a broad, essentially unlimited indemnity clause from the provider for harm it may cause.
- Requiring significant, meaningful insurance.
- And, where appropriate, obtaining a parental guarantee.

The exact application of these requirements may vary substantially by a provider--providers with solid assets, a favorable track record and a modest proposal for construction in the rights-of-way may have fewer requirements imposed on them than a new company with a poor track record, few assets and a proposal for extensive work in the public rights-of-way.

IV. CONCLUSION

For the reasons set forth the Notice of Inquiry should be terminated without further action by the Commission.

John W. Pestle

Kenneth S. Fellman
Kissinger & Fellman, P.C.
Ptarmigan Place, Suite 900
3773 Cherry Creek North Drive
Denver, CO 80209
Attorney for Greater Metropolitan Telecommunications Consortium
(303) 320-6100
December 11, 1999

John W. Pestle
Patrick A. Miles Jr.
VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
333 Bridge Street, N.W.
Grand Rapids, MI 49504
Attorneys for Concerned Communities and Organizations
(616) 336-6000

EXHIBIT A-ILLINOIS NATOA MEMBERS

Cook County
Village of Lisle
County of Kane
City of Rock Island
Will County Governmental League
Village of Hoffman Estates
Village of Schiller Park
City of Darien
City of Marshall
Village of Carol Stream
Village of Orland Park
Village of Maywood
Town of Munster
City of Waukegan
Village of Glen Ellyn
City of Wheaton
Village of Oak Brook
Village of Oak Park
Village of South Elgin
Village of Grayslake
Village of Northbrook
Village of Mundelein
Village of Schaumburg
South Suburban Mayors & Managers Association
City of Chicago
Village of Lombard
City of Flora
Village of Flossmoor
City of Galesburg
Village of Homewood
City of Pontiac
City of Des Plaines
City of Rolling Meadows
Elk Grove Village
Village of Lincolnwood
Village of Clarendon Hills
City of Crystal Lake
City of Highland Park
City of Naperville
City of Aurora

Village of Arlington Heights
Village of Algonquin
Village of Downers Grove
Village of Schiller Park
West Central Municipal Conference
City of Lake Forest
City of Champaign
City of Lone Tree
Village of Woodridge
Village of Savoy
City of St. Charles
Village of Niles
City of Rockford
Village of Libertyville
Village of Carpentersville
City of Moline
Village of Minooka
City of Rochelle
Village of Schiller Park
Village of Deerfield
Village of Rantoul
County of Lake
Village of Morton Grove
Village of Homewood
Village of Barrington
City of Chicago
City of Springfield
City of Rolling Meadows
City of Evanston
Village of Elk Grove
Village of Riverside
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Village of Buffalo Grove
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City of Aurora
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Village of Schaumburg
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Village of Niles
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Village of Glenview
Village of Riverwoods
City of Oak Forest
City of Oak Forest
City of Oak Forest
City of Chicago Law Dept.
City of Chicago Law Dept.
City of Wheaton

CERTIFICATE OF SERVICE

I, Kim Van Dyke, a secretary at the law firm of Varnum, Riddering, Schmidt & Howlett LLP, hereby certify that on this 11th day of December, 1999, I sent by first class mail, postage prepaid, a copy of the foregoing comments to the persons listed below.

The Honorable William Kennard
Chairman
Federal Communications Commission
The Portals
445 12th Street, S.W.
Suite 8-B201
Washington, DC 20554

The Honorable Harold Furchtgott-Roth
Commissioner
The Portals
445 12th Street, S.W.
Suite 8-B201
Washington, DC 20554

The Honorable Michael Powell
Commissioner
The Portals
445 12th Street, S.W.
Suite 8-B201
Washington, DC 20554

The Honorable Gloria Tristani
Commissioner
The Portals
445 12th Street, S.W.
Suite 8-B201
Washington, DC 20554

The Honorable Susan Ness
Commissioner
The Portals
445 12th Street, S.W.
Suite 8-B201
Washington, DC 20554

Melvin C. Del Rosario
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W.
Room 4C264
Washington DC 20554

Thomas Sugrue
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W.
Room 3C207
Washington, D.C. 20554

James D. Schlichting
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals
445 12 Street S.W.
Room 3C207
Washington, D.C. 20554

Joel D. Taubenblatt
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W.
Room 4A260
Washington, D.C.

Jeffrey Steinberg
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals
445 12 Street, S.W.
4th Floor, Suite 4C236
Washington, D.C. 20554

Steve Weingarten
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W.
Room 3C207
Washington, D.C. 20554

Elizabeth Lyle
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W.
Room 3C227
Washington, D.C. 20554

David Furth
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W.
Room 3C217
Washington, D.C. 20554

Kathleen O'Brien Ham
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W.
Room 3C207
Washington, D.C. 20554

International Transcription Services, Inc.
1231 20th Street, NW
Washington D.C. 20037

Kim Van Dyke

Kim Van Dyke

::ODMA\PCDOCS\GRR\373700\1